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Message Text

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E.O. 11652: N/A

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SUBJECT: ISRAELI REQUESTS TO DISCUSS EFFECT OF 1974
RETIREMENT ACT ON PURCHASE OF ISRAELI BONDS AT JSG MEETING

REF: STATE 276936

FOR ASSISTANT SECRETARY PARSKY

1. PRELIMINARY VIEWS OF TREASURY LAWYERS ON ISRAELI
REQUEST FOLLOW:

2. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974
(ERISA) WAS INTENDED TO CODIFY INTO FEDERAL LAW THE COMMON
LAW OF TRUSTS. ERISA EMBODIES FOUR FIDUCIARY STANDARDS,
THE MOST IMPORTANT OF WHICH FROM AN ISRAELI PERSPECTIVE IS
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THE PRUDENT MAN RULE. UNDER THIS RULE THE FIDUCIARY IS

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REQUIRED TO DISCHARGE HIS DUTIES WITH CARE, SKILL, PRUDENCE
AND DILIGENCE WHICH A PRUDENT MAN WOULD USE UNDER THE SAME
CIRCUMSTANCES IN CONDUCTING A SIMILAR ENTERPRISE.

3. WHILE THE EXACT CONTOURS OF THIS RULE WILL HAVE TO BE
FILLED OUT BY COURTS, THE CONFERENCE COMMITTEE'S REPORT,
BASING ITS VIEWS TO A CONSIDERABLE EXTENT ON EXISTING
CASE LAW, INDICATED THAT THE COURTS SHOULD INTERPRET THE

RULE "BEARING IN MIND THE SPECIAL NATURE AND PURPOSE OF
EMPLOYEE BENEFIT PLANS." ERISA ALSO INDICATES THAT
WHERE THERE IS A CONFLICT BETWEEN THE FIDUCIARY STANDARDS
SET FORTH IN ERISA AND THE FIDUCIARY STANDARDS SET FORTH
IN THE DOCUMENT ESTABLISHING THE PLAN, THE ERISA PRO-
VISIONS SHOULD GOVERN. THUS CERTAIN EXCULPATORY CLAUSES
IN PLAN DOCUMENTS ARE NULLIFIED BY ERISA. SIMILARLY,
INSTRUCTIONS FROM THE SPONSOR OF THE PLAN WHICH MAY BE
CONTRARY TO THE PRUDENT MAN RULE ARE TO BE IGNORED IN
FAVOR OF THE RULE. FINALLY, ERISA PROVIDES THAT THE
INVESTMENT MANAGER WHO BREACHES ANY OF THE ACT'S FIDUCIARY
STANDARDS IS PERSONALLY LIABLE FOR LOSSES SUFFERED BY THE
PLAN WHICH RESULT IN THAT BREACH.

4. IT IS OUR TENTATIVE VIEW THAT IT WOULD BE INAP-
PROPRIATE FOR TREASURY TO STATE THAT THERE IS NO ANTI-
PATHETIC RELATIONSHIP BETWEEN ERISA AND INVESTMENT IN
STATE OF ISRAEL BONDS BY FIDUCIARIES. SUCH A PRONOUNCE-
MENT WOULD APPEAR TO PUT TREASURY IN A POSITION OF RENDER-
ING JUDGMENT ON FINANCIAL MATTERS WHICH ARE MORE PROPERLY
WITHIN THE JUDGMENTAL DOMAIN OF INVESTMENT MANAGERS AND,
ULTIMATELY, THE COURTS. QUITE OBVIOUSLY THE PUBLICITY
SURROUNDING ERISA'S ENACTMENT AND ERISA'S UNCOMPROMISING
INSISTENCE THAT INVESTMENT MANAGERS DEPART FROM THE
PRUDENT MAN RULE AT THEIR PERSONAL RISK HAVE SERVED TO
MAKE INVESTMENT MANAGERS MORE CONSERVATIVE AND THUS TO SHY
AWAY FROM INVESTING IN FOREIGN SECURITIES WHERE THE LEVEL
OF RISK MAY BE PERCIEVED TO BE UNKNOWN OR HIGHER THAN THAT
OF MANY DOMESTIC SECURITIES. WE BELIEVE THAT THE PROPER
APPROACH WOULD BE FOR ISRAELI AUTHORITIES TO MAKE ISRAEL'S

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OWN FINANCIAL POSITION CLEAR TO PENSION PLAN MANAGERS SO
THAT THEY CAN MAKE INFORMED DECISIONS ON WHETHER INVESTMENT
IN STATE OF ISRAEL BONDS WOULD BE IN CONFORMITY WITH THE
PRUDENT MAN RULE ESTABLISHED BY ERISA. KISSINGER

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